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Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 339.

WILLIAM HAWS ET AL., APPELLANTS,

vs.

THE VICTORIA COPPER MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF UTAH.

BRIEF FOR THE APPELLEE.

C. H. ARMES,
Attorney for the Appellee.

C. C. DEY,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

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SUMMARY OF THE FACTS.

The findings of fact in the record show substantially as follows:

1st. That one Lewis R. Dyer, the locator of the two mining claims in question, called respectively Antietam lode and Copper the Ace lode, discovered and appropriated a mineral vein or lode of rock in place. (Record, p. 11.)

2d. That at the time of such discovery and location the land was public mineral land, wholly unoccupied and unclaimed.

3d. That on 17th September, 1887, said Dyer, being a citizen of the United States, located said claims by writing on a tree near the place or places of discovery two notices of location, one for each claim.

4th. That said notices described the respective claims by reference to said tree and by boundaries of each claim by courses and distances from said tree, giving the name of the locator and date of the location; that said tree was a sufficient natural object by which said claims could be identified.

5th. That afterwards and during September, 1887, said Dyer marked sufficiently on the ground the boundaries of said mining claims and each of them by setting suitable stakes or posts at the corners of each of said claims; also at the center of the respective side lines of each of said claims; also by writing on the stakes to identify them with reference to the respective claims.

6th. That on February 13, 1888, said Dyer caused a copy of said location notices to be recorded in the office of the county recorder; that there was not at that time or at the time of locating said claims any mining district recorder; that said claims were situated in what had been known as the "Carbonate mining district;" that the rules and regulations of said mining district had long prior to 17th September, 1887, fallen into disuse and were not then or for a long time prior thereto had not been in force and effect.

7th, 8th, 9th. That since said 17th September, 1887, until June 10, 1889, said Dyer and his grantee, the appellee, continuously worked upon and improved said mining claims and actually possessed the same, and expended in work and improvements upward of $7,000; that said work and improvements were such as did develop said claims and each of them, and that for each calendar year 1887, 1888, and

1889 more than one hundred dollars' worth of work was done on each of said claims.

10th. That on Sunday night, the 9th day of June, 1889, while the appellee was in actual possession of said claims and working the same, by its agents and employés, the appellant William Haws went upon the ground of said mining claims with two men and wrongfully took possession of the same, prepared to hold such possession by force, and did wrongfully keep the appellee and its employés from thereafter working said claims and have ever since wrongfully excluded them therefrom.

11th. That the appellant Haws worked on said mining claims as an employé of appellee at various times, including the period from the month of March, 1889, to June 1, 1889, when he voluntarily left the employ of the appellee, and that said Hawes, while working for the appellee in 1888, formed the secret intent to take possession of said mines (pp. 11, 12, 13).

The findings numbered 12 to 16, inclusive, relate to proceedings on the part of appellants, William Haws and Heber Timothy, to make locations of the ground in question as mining claims (pp. 13, 14), and the thirteenth finding (p. 13) shows also that on the 4th day of June, 1889, a mining district was organized, including within its boundaries the old Carbonate district.

The remaining three findings pertain to a survey of the claims for patent by the appellee; to a resetting of its stakes; to addendum notices of location; to the recording of the same, and to the amount of ore taken from said claims by the appellant from the premises.

The record also shows that the appellant William Haws immediately after seizing said mining claims on the Sunday, June 9, as above shown, addressed the appellee a com-

munication indicating that the appellee could regain possession for a consideration (p. 44). That communication is as follows:

"VERNAL, UINTA COUNTY, UTAH, *June* 9, 1889.

"VICTORIA COPPER MINING COMPANY,
Chicago, Illinois.

"DEAR SIRS: I have relocated the Copper the Ace and Antietam mines, situated in Carbonate mining district, Uinta county, Utah. I will commence work on the mines tomorrow. I am willing to do what is right about it, and advise you to come out and see me forthwith. Please let me know whether you are coming or not by return mail.

"Yours very respectfully, WILLIAM HAWS.

"Address: William Haws, Vernal, Uinta County, Utah."

ARGUMENT.

It is submitted—

1. That the facts found by the court are supported by testimony to which there was no objection, and as to the sufficiency of which there is no assignment of error.

2. There was no error in the rulings of the court; and if there was, the testimony to which the assignments of error relate was not necessary to the case of the appellee, and therefore the appellant was not prejudiced even if that evidence was considered by the court.

I.

The contention of the appellants at the trial as to the right of the appellee appears to have been, not that the appellee was not in possession of the mines working and claiming them in good faith, but that Lewis R. Dyer, the original locator, through whom the appellee claims, *never staked the ground*. That question—whether or not Dyer staked the

claims—appears to have been made the vital question in the case. It is the reason *alleged* by appellant Haws for "jumping" the mines (p. 47).

According to the decisions of this Court, especially in the recent case of Runkle *vs.* Burnham, 153 U. S., 225, it is understood that "the findings of fact made by the court below are binding here if there be any evidence to support them." (See also Hinkley *vs.* Pittsburgh Steel Co., 121 U. S., 265.)

The following statements as to stakes are taken from evidence *which was not objected to*, and they support the findings:

Lewis R. Dyer (p. 25), among other things, says that he, on or about 19th August, 1887, placed stakes at corners one and four in connection with a tunnel location and made a mill-site location near by.

On 17th September, 1887, finally decided to make two locations, the "Copper the Ace" and the "Antietam." On that day wrote two notices with a lead pencil on a tree and staked out the claims; the tree was a dead-white pine, the largest and most convenient around there. Copies of the two notices were recorded. After writing the notices on the tree, put in other stakes (indicating points on map); also a stake at the center of each side line of the claims. On the two stakes common to the Copper the Ace put "A" on the side of the "Antietam" and "C. A." on the side of the "Copper the Ace" in lead pencil. In order to set the stakes at the end, measured through the center line and put markers at 1,500 feet, and then, to put the corner stakes, measured an offset of 300 feet on each side and left the stakes at the center of the end lines. The stakes were set within two weeks after the location notices were written. Wm. B. Rankin was present (p. 26) the most of the time and helped make the measurements through the center line. Rankin, Shaw, Lawson, and Sedwick were in the camp working on

the road at the time the notices were written. Rankin helped put in the first two stakes; also worked on the claims.

WM. SHAW (p. 30) worked for Dyer in September, 1887, and in October worked on the premises in question; saw the two notices of Dyer written on the tree; saw one stake. My work was around the open cut, and had no occasion out in either direction from it. It was marked on two sides.

MCLAUGHLIN (p. 32) was in employ of Victoria Company in June and July, 1888; walked over the ground from one end to the other and have seen stakes; saw one at extreme north end of the two claims, near the summit; also saw a stake where we loaded at the mine; also one between them and the cabin to the right of the road going to the cabin; don't know whose stake it was. There was also one to the northeast. There was one stood up in the timber back from the wood. There was one directly above the workings of the mine also. I saw a stake at the point marked corner 2. There were several stakes in that part of the mountain. I saw one near the center of the end line of Antietam; that would be at the place marked corner 1, common corner of the Antietam and Copper the Ace. It was a good stake; would not fall readily, because I ran over it with a wagon; entered employ of plaintiff in June and quit in July, 1888; not been there since; saw stakes at the corner marked corner 3 of the Antietam; whether it belonged to that claim or not could not say. There had been old stakes there.

WILLIAM DONOHER (p. 35): From 17th November, 1887, until November, 1889, was steadily at work for Mr. Dyer and plaintiff; was foreman on premises; showed Jensen, the surveyor, the initial point from which he started. While measuring the *Harrison* claim with defendant Haws in April, 1889, saw a stake close to the point 1,500 feet from the open cut; Haws was present (37).

ANDREW JOHNSON (p. 39): Went to work for plaintiff about 28th May, 1889, and worked till 2d July, 1889; about 1st July, 1888, had a conversation with Haws and Donoher about their claim, called the *Harrison;* went to see Haws about it. Haws was going to give me an interest in it for sinking so many feet; went to the Harrison with Haws and, coming back, we came across a stake. I said, Haws, isn't this one of Dyer's stakes? and he said, It may be, but it is lying down and it is no good. I saw the place where the stake had been standing. A few little rocks were around it. It was somebody's corner; I didn't know whose.

FERGUSON (p. 41): In November, 1887, was on the claims. Dyer was there with workmen; saw two notices on a tree of Copper the Ace and Antietam and a tunnel-location notice.

It is submitted that the above statements from the testimony abundantly sustain the findings as to marking the boundaries by stakes, and an examination of the evidence as reported shows that the findings in all essential particulars are supported by testimony that was not objected to. This case appears to come within the ruling in the abovementioned case of Rankin *vs.* Burnham, 153 U. S., 225.

The case having been submitted to the court without a jury, it is understood from the rulings of this court in numerous cases that these findings of fact are not *mere reports of the evidence*, but that they are statements of the ultimate facts on which the rights of the parties are determined by the law; findings of the *propositions of fact which the evidence establishes.*

Norris *vs.* Jackson, 9 Wall., 127.
Booth *vs.* Tieman, 109 U. S., 205.
Martinton *vs.* Fairbanks, 112 U. S., 674.
Stanley *vs.* Supervisors, 121 U. S., 547.

These findings of fact by the court being clearly supported by evidence to which no objection was made, is it necessary to argue the exceptions which were taken to other testimony?

THE EXCEPTIONS.

The objections raised are not set forth in a bill of exceptions according to the usual rules of law and practice, but it would seem they are brought here in a manner calculated to present the case for the judgment of this Court upon the whole evidence.

First. What is before the Court? The "certificate of trial, objections, etc., filed in the supreme court October 15, 1891, at Salt Lake City," and signed "James A. Miner, judge; C. S. Zane, C. J." (pp. 78 to 84), is a paper of an *extrajudicial* character and is believed to form no part of these proceedings. If it was intended as a bill of exceptions, it should have been signed by the judge who sat at the trial of the case (sec. 953 R. S. U. S.; Origet *vs.* U. S., 125 U. S., 240) and cannot be so much as amended or redrafted in the appellate court. (Stimpson *vs.* Westchester R. R. Co., 3 How., 553.)

Second. There is, strictly, no bill of exceptions in this case. There is a correct transcript of the record (so certified by counsel, p. 79), and this was "settled and allowed as and for the defendants' statement on motion for a new trial of this action" (p. 66). Unless this will be taken in this Court as and for a *bill of exceptions* there appears to be none in this record. (See Fishburn *vs.* St. P. Railway Co., 137 U. S., 60.) It would seem not to conform to the statutes of Utah, for the supreme court of the Territory mentions it with disfavor.

II.

ALLEGED ERRORS.

If the rulings are properly here, then it is submitted that the rulings are not erroneous, and that, at most, they relate to evidence on the part of the appellee which was not necessary to its case, and did not prejudice the appellants.

Assignments 1 and 2 (pp. 76, 77). The witness Lewis R. Dyer having testified, among other things, substantially to having written notices of his respective claims—Antietam and Copper the Ace—on a tree, and that he made copies of said notices in camp on a figuring block, and that at Salt Lake City, at the hotel where he was stopping, he copied them on paper about the first of February, 1888, and mailed them to parties at Vernal to be recorded, and that he destroyed the original notices written on the figuring block after he made the copies at his hotel, the plaintiff offered in evidence the recorded copies of said notices, entitled "Exhibits C and D". The appellants objected, and they were admitted subject to the objection. It is respectfully submitted that this was not error. These copies were the best evidence in existence, the original being impossible of production, having been destroyed. The notices were in the first instance written upon a tree as one of the acts of location. This testimony, however, was not necessary, for the other acts of location shown in finding No. 5 (p. 12) were found to be sufficient and were all that the law required to make valid locations in the absence of local laws and regulations respecting them. (R. S. U. S., 2324; Book *vs.* Justice Mining Company, 58 Fed. R., 106.)

It was objected, *first*, that it did not appear that said exhibits were filed in any mining recorder's office, and that there was no law requiring them to be filed in the county recorder's office (p. 32).

The answer is that there was no mining recorder and no local laws or regulations of miners in force or effect (find. No. 6, Rec., p. 12), and under the act of Congress a record is not essential to the validity of mining claims.

Jupiter Min. Co. *vs.* Bodie C. Min. Co., 11 Fed. R., 666.

The N. N. Min. Co. *vs.* The Orient Min. Co., 1 Fed. R., 522.

S. C. G. & S. Min. Co. *vs.* Europa Min. Co., 15 Nev., 383.

Thompson *vs.* Spray, 72 Cal., 528.

Neither do the laws of the United States require any notice to be posted upon the location of a mining claim, and in the absence, as here, of local laws or regulations the locations were valid without any notice being placed on the ground.

Book *vs.* Justice Min. Co., 58 Fed. R., 106.

The record is left to be provided for and its effect to be determined by the local laws and regulations of miners, and if no record has been provided for, which provision must precede the act of recording, then no record is necessary.

There is no statute requiring location notices to be recorded in the county recorder's office, but in the absence of a mining district recorder it has become a universal and acknowledged custom, one sanctioned by the General Land Department of the Government, to record such notices in the county recorder's office. In Utah Territory it is the recognized place, inasmuch as the county recorder is by statute (2 Comp. Laws of Utah of 1888, sec. 2798) made the legal custodian of mining records in case of a vacancy in the office of the mining district recorder and authorized to certify to such records, and also to all other instruments recorded. (2 Comp. Laws of Utah, 1888, sec. 2623.)

The laws of Utah referred to are as follows:

"SEC. 2622. That all instruments of writing, now copied into the books of record of the office of the county recorders of the several counties of this Territory, shall, after the passage of this act, be deemed to impart to subsequent purchasers and incumbrancers, and to all other persons whomsoever, notice of all deeds, mortgages, powers of attorney, contracts, conveyances, or other instruments, so far as, and to the extent that the same may be found recorded, copied, or noted in the said books of record, notwithstanding any defect, omission or informality existing in the execution, acknowledgment, certificate of acknowledgment, recording, or certificate of recording the same; *Provided*, That nothing herein contained shall be construed to affect any rights heretofore acquired in the hands of subsequent grantees or assignees.

"SEC. 2623. That duly certified copies of such instruments as are embraced in the preceding section of this act, may be read in evidence under the same circumstances and rules as are provided in this act for using copies of instruments duly executed and recorded.

"SEC. 2798. Whenever there is a vacancy in the office of recorder of any mining district, or the person holding such office shall remove from the district leaving therein no qualified successor in office; or whenever from any cause there is no person in such district authorized to retain the custody and give certified copies, of the records, it shall be the duty of the person having custody of the records to deposit the same in the office of the county recorder of the county in which such mining district, or the greater part thereof, is situated, and the county recorder shall receive such records, and is hereby authorized to make and certify copies therefrom, and such certified copies shall be received in evidence in all courts and before all officers and tribunals in the same manner and to the same effect as if certified by a qualified recorder of the mining district. The production of a certified copy so made, shall be, without other proof, evidence that said records were properly in the custody of the county recorder."

It was further objected, *second*, that the notice filed and offered in evidence was a copy of a copy and not admissible.

What was written on the tree was sought to be proved. The tree was no longer in existence. The undisputed evidence showed that the recorded copies offered and received in evidence were respectively copies of the notices written on the tree (Rec., p. 25). The new copies so made were the copies recorded and offered in evidence and verified by Mr. Dyer as copies of the notices written on the tree.

In Winn *vs.* Patterson, 9 Pet., 663–667, the Court say:

"We admit that the rule that a copy of a copy is not admissible evidence is correct in itself when properly understood and limited to its true sense. The rule properly applies to cases where the copy is taken from a copy, the original still being in existence and capable of being compared with it, for then it is a second remove from the original, or where it is a copy of a copy of a record, the record being in existence, by law deemed as high evidence as the original, for then it is also a second remove from the record; but it is quite a different question whether it applies to cases of secondary evidence where the original is lost or the record of it is not in law deemed as high evidence as the original, or where the copy of a copy is the highest proof in existence. On these points we give no opinion, because this is not, in our judgment, the case of a mere copy of a copy verified as such, but it is the case of a second copy verified as a true copy of the original."

Assignments 3, 4, 5, and 6 (p. 77). The witness McLaughlin, for the plaintiff, having testified, among other things, substantially that he knew a certain claim called the "Harrison" claim (which, according to the testimony of the defendant Haws and one Donoher, was located by them contiguous to the "Copper the Ace"), was asked, "Did Haws show you that claim?" and, "Were you shown any stakes by Mr. Dyer?" (p. 35).

The court permitted the witness to answer subject to objection, and the witness answered substantially that Haws did show him the claim, and that one of its boundary marks was a stake which Haws said was a corner of his

claim, the Harrison, and of the Copper the Ace (p. 33); also that Mr. Dyer showed him a stake. This, it is submitted, was not error. This evidence tended to show that the boundaries of the claims were known, and also tended to show that Haws was acquainted with them.

It will be observed that in the sixth assignment the answer of the witness is inaccurately stated. The answer shows the question and answer harmless and immaterial. (Rec., p. 33.)

Assignment 7 (p. 77). The question to William Donoher, "Have you or the defendant Haws ever located any mining claims in that vicinity?" was objected to. The answer was that Haws and he had located one claim, called the Harrison; it joins on the east end of the Copper the Ace; that they measured from what they believed to be the discovery point of the Copper the Ace, leaving a space between that discovery point and the claim so located by them—this, it is submitted, was competent for the purpose of showing that the location of the appellee's claim was so well known to Mr. Haws that he was able to use it as a sufficiently notorious object under the law to measure from (p. 36).

Assignments 8, 9, 10 (p. 77, '8). The question to the witnesses Johnson and Pope was whether Haws told them anything about his intention to take possession of the mine. The appellants claim through Haws, and Haws testified (p. 47) in substance that he did conceive the idea of taking the property while at work for the appellee, because Dyer had no stakes. The witness was permitted to answer. It is submitted that the ruling was correct; but, in view of this admission by Mr. Haws, no harm resulted, even if there was error.

Assignment 11 (p. 78). The question objected to was as to the amount of money expended by the appellee in working the mine. A sufficient reply would seem to be that the law (sec. 2324, R. S. U. S.) requires labor or improvements

to the extent of $100 in value annually. The witness answered the question to the effect that the company expended about $7,000. This tends to show that the work of the appellee is a *bona fide* mining enterprise, carried on in good faith, in full compliance with the law in respect to the expenditure of money in work and improvements. On the other hand, the manner in which the appellants acquired their possession of the premises is noticeable. Their object and purpose as manifested by the letter of Haws to the appellee company bears its own commentary. The United States owned the land, and rights to the same could only be secured by a *bona fide* compliance with the laws and not by fraud, stealth, and force.

Atherton *vs.* Fowler, 96 U. S., 513.
Erhardt *vs.* Boaro, 113 U. S., 527.

The third, fourth, fifth, seventh, eighth, ninth, and tenth assignments of error above mentioned relate to the admission of certain evidence of declarations and acts of the appellant William Haws.

The first question raised under the pleadings and proofs was as to the validity of plaintiff's locations. All the evidence offered by the plaintiff in support of the validity of its locations by showing discovery and that the locations were distinctly marked on the ground so that their boundaries could readily be traced was unobjected to, and the defendants admitted that "plaintiff had caused to be done and performed on each claim more than one hundred dollars' worth of work for the years 1888 and 1889" (Rec., p. 42), and the special findings of the court in relation thereto made the plaintiff's right to the ground absolute as against appellants.

Belk *vs.* Meagher, 104 U. S., 279.
to Campbell v. Rankin 99 U. S. at p. 262.

The second question so raised was whether, even if plaintiff's locations were found to be invalid, the appellants

Haws and Timothy could initiate valid locations of the ground in the way they attempted to, Haws forming the intention so to do while working on the same ground in the employ of the plaintiff, then leaving plaintiff's employ and conspiring with Timothy to take possession, and, by secretly taking possession after dark on Sunday, ousting plaintiff from actual possession, and prepared to hold possession by force, thereupon relocating the ground and soon thereafter causing it to be located again by Timothy, to nominally leave Haws' name out in anticipation of trouble from plaintiff.

It was under this last issue that the evidence was offered and admitted. It had a tendency, in connection with the other evidence adduced, to show that Haws and Timothy had not initiated any valid rights by their location, and, if so, his grantees acquired no better or superior rights.

Again, if the evidence was improperly admitted at the time, the error was cured, as Haws was afterwards called as a witness on the part of the defendants, and, after testifying generally, denied that he ever made the statements or did the acts imputed to him. Had Haws so testified before evidence had been received of his declarations and acts complained of, such evidence would have been admissible, if not as evidence-in-chief, as going to impeach the credibility of his testimony. Consequently, the question is narrowed down to the mere order of proof, which is a matter principally in the discretion of the trial court and not a ground of error.

Rounsavell *vs.* Pease, 45 Wis., 506–'11.

All the evidence objected to was unnecessary and could not affect the merits of the case, the other evidence being sufficient to sustain the judgment. Treating the objections, therefore, as having been overruled by the court and the evidence as having been admitted, still it is submitted the ruling would not be harmful to the appellants and therefore not reversible error.

This contention seems to be well illustrated in the case of Hinckley *vs.* Pittsburg Steel Co., 121 U. S., 265.

See also District of Columbia *vs.* Woodbury, 136 U. S., 461.

This Court has repeatedly held that it will not reverse for errors in the rejection or admission of evidence unless shown to be unquestionably prejudicial, and in trials before a court it will not be presumed that incompetent evidence was considered.

As said by this court in Holmes *vs.* Goldsmith, 147 U. S., 150–164:

"The modern tendency, both of legislation and of the decisions of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in unless there is reason to think that practical injustice has been thereby caused."

It is submitted that the claims of the appellants do not come within the spirit of the laws governing claims and protecting the rights of miners, but that they are based upon a tortious and wholly unwarrantable proceeding in law or social order: that the claims of the appellants in their appeal, as well as their inception, are devoid of merit, and that the judgment below should therefore be affirmed, with costs and damages, upon the principle declared in the case of Watterson *vs.* Payne, 154 U. S., 534.

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Of Counsel.

The foregoing brief was printed before appellants' brief was filed.

1. The vital point of contention by appellants at the trial, viz., that Dyer did not mark the boundaries of the claims with stakes, is expressly abandoned in appellants' brief (p. 30), where they say they *do not rely upon the exceptions to the third and fifth findings, inasmuch as there was certain conflicting evidence not excepted to, which may justify these findings.*"

2. As to the alleged misdescription of the property in question, it does not appear that the question was raised below, or that there has been any ruling, exception, finding, or assignments of error on the subject. Therefore there appears to be nothing for this Court to consider. It must, however, be apparent from the entire record that any defect in description of the metes and bounds is of a clerical or a typographical, and not of a substantial, character. At most it could only be a defect of a formal character, which the Court would allow to be corrected, and which cannot be taken advantage of after verdict.

Coryell *vs.* Cain, 16 Cal., 567.

3. As to the appellants' claim that there was but one point of discovery, the complaint describes two (p. 1): "The Antietam Lode mining claim begins at the point of discovery, on the northeast side of the stump of the tree," &c. "The Copper the Ace Lode mining claim begins at the point of discovery, which is marked by a post, from which a shaft about sixty feet deep bears south," &c.

The third finding shows that Dyer *located the two mining claims by writing on a tree standing at or in close proximity to the place or places of discovery,* &c. (p. 12), and the objection taken to this finding has been withdrawn. Moreover, the question as to the number of points of discovery was never raised below in any form, and is not assigned as error.

4. The tenth finding is supported by evidence. Johnson says Haws had told us he was going to take possession. The Sunday night previous, about a mile from the claims, he asked Donoher if he would quit work. Donoher said he would not. Haws said that he would see that he would quit work, as he had to have possession of the mine (p. 39). See also the testimony of Pope (p. 41) and of Haws (pp. 47 and 48); also Exhibit 4 (p. 44). There was actual possession and it was not abandoned.

Lawrence *vs.* Fulton, 19 Cal., 648.

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